No. 79-703

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERNARD CAREY, as State's Attorney of Cook County Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

On Appeal From The United States Court
Of Appeals For The Seventh Circuit

MOTION OF APPELLEES TO AFFIRM

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Pursuant to Rule 16 of the Rules of the United States Supreme Court, Appellees in the above-entitled case move that the opinion and order of the Court of Appeals for the Seventh Circuit be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

I.

The opinions below, the bases for jurisdiction, the statute involved and the statement of the case are satisfactorily set forth in the Jurisdictional Statement for Appellant Bernard Carey.

II.

The Jurisdictional Statement for Appellant Bernard Carey misstates the question presented. Appellant Carey formulates the question [J.S. at 4]: "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential public purposes?"

The Illinois Residential Picketing Statute permits labor picketing not only of "dwellings used for non-residential public purposes" but also of "dwellings used solely for private residential purposes." See *Brown* v. *Scott,* 602 F.2d 791, 793-94 (7th Cir. 1979), J.S. App. at 5a-6a. The question presented, properly formulated, is: "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes except labor picketing?"

III.

The Seventh Circuit correctly held that there is no principled basis for distinguishing the Illinois Residential Picketing Statute from the ordinance held to be unconstitutional by this Court in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972). *Brown* v. *Scott, supra,* 608 F.2d at 794, J.S. App. at 7a. See also *People Acting Through Community Effort* v. *Doorley,* 468 F.2d 1143, 1145-46 (1st Cir. 1972). In virtually the same language as the Chicago ordinance struck down in *Mosley,* the Illinois statute impremissibly regulates speech based on content. This Court has consistently reaffirmed the Constitu-

tional basis of *Mosley*—that speech may not be regulated solely on the basis of its content. See, *e.g., First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 (1978); *Hudgens* v. *National Labor Relations Board,* 424 U.S. 507, 520 (1976); *Young* v. *American Mini Theatres,* 427 U.S. 50, 64 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 94 (1976); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209, 215 (1975).

Appellants argue that the state's interest in protecting residential privacy distinguishes this case from *Mosley.* The Court of Appeals found it unnecessary to strike a balance between the First Amendment rights and the right to privacy by expressly reserving the question whether a properly drafted residential picketing statute which did not discriminate on the basis of content would be constitutional. By deciding this case on equal protection grounds, the Court of Appeals properly avoided considering this novel constitutional question, as well as the further question whether the statute as drafted was overbroad or void for vagueness. *Brown* v. *Scott, supra,* 602 F.2d at 795, J.S. App. at 8a.

Appellants further attempt to distinguish *Mosley* on the ground that the statute involved in *Mosley* protected public property while the Illinois Residential Picketing Statute protects private property. This case does not present a situation where the picketing occurred on private property. Compare *Hudgens* v. *National Labor Relations Board, supra.* The picketing occurred on public streets and sidewalks, which have been consistently recognized as public forums. See *Hague* v. *C.I.O.,* 307 U.S. 496 (1939). There is no allegation that any trespass was committed against either private or public property. Compare *Adderley* v. *Florida,* 385 U.S. 39 (1966). Furthermore, this Court has recognized that there is an important governmental inter-

est in preventing disruption in the schools. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). Therefore, the Court of Appeals correctly recognized that no principled distinction could be drawn between an ordinance which discriminates in favor of labor picketers and against civil rights picketers in a school setting and a statute which similarly discriminates between them in a residential setting.

CONCLUSION

Wherefore, for the foregoing reasons, the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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